

**BANKRUPTCY AND INSOLVENCY  
AS AN EXPANDING FIELD: A HISTORICAL ANALYSIS OF  
REFERENCE RE DEBT ADJUSTMENT ACT, 1937 (ALTA.)**

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*The drought of the early 1920s and the economic collapse of the 1930s caused unprecedented problems for farmers in Alberta. Low prices and poor markets caused farmers to become overindebted. Parliament's response to the situation was the Farmers' Creditors Arrangement Act, 1934 (FCAA), which was intended to create an alternative mechanism to bankruptcy through which farmers could negotiate debt compromises with their creditors. Parliament viewed the situation as a temporary issue, and the FCAA reflected this assumption. In contrast, the prairie provinces sought long-term debt adjustment legislation for farmers and other debtors affected by the Great Depression. In Alberta, two reformist social movements created new legislation to alleviate the debt burden in the province. The United Farmers of Alberta created the first Debt Adjustment Act (DAA) in 1923 to address the issue, which was then modified and expanded in the later 1930s by the new Social Credit government. However, in its attempt to create a robust debt adjustment scheme, the Social Credit government created a regime which overstepped the bounds of provincial jurisdiction. In 1941, Alberta's DAA was referred to the Supreme Court of Canada where it was decided that the DAA was ultra vires the province as legislation on bankruptcy and insolvency, an area reserved exclusively for the federal government. The decision was upheld by the Privy Council in 1943. This article outlines the historical context of the DAA, the basis for its invalidity, and argues that the impact of the reference decision was the affirmation of a broad construction of the federal bankruptcy and insolvency power.*

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## I. INTRODUCTION

The Great Depression and the Dust Bowl of the 1930s profoundly impacted farmers in Canada's prairie provinces. Faced with falling prices and increasing debt caused by the environmental and economic conditions of the time, provincial and federal governments enacted legislation to help farmers facing insolvency. In 1934, Parliament passed the *Farmers' Creditors Arrangement Act* to provide relief for farmers facing insolvency as an alternative to existing bankruptcy mechanisms.<sup>1</sup> In Alberta, many people in cities and towns were no better off than farmers. Due to high unemployment, thousands lacked the money for necessities.<sup>2</sup> In response, the new Social Credit government of Alberta strengthened its *Debt Adjustment Act* by expanding its scope to include all debtors, instead of only farmers. However, this *Act* would meet a fate similar to many early Social Credit statutes, thirteen of which were declared ultra vires by the courts or disallowed by the federal government.<sup>3</sup> In 1941, the constitutionality of Alberta's *Debt Adjustment Act, 1937* was referred to the Supreme Court of Canada, which found it to be ultra vires as legislation on bankruptcy and insolvency, an area exclusively reserved for the federal government.<sup>4</sup>

This article will review the *Reference as to Validity of The Debt Adjustment Act*.<sup>5</sup> The article adopts the framework for analysis first utilized in *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law*, by placing the decision in its social and political context.<sup>6</sup> The article will examine the historical background of the *DAA* and the reference case, review the arguments contained in the original factums and decision at the Supreme Court of Canada and on appeal to the Privy Council, and it will consider Alberta's legislative approach after the *Act* was found invalid. Ultimately, the *DAA Reference* expanded the body of jurisprudence suggesting that the federal power over bankruptcy and insolvency should be interpreted broadly. The *Debt Adjustment Act* decisions reinforced the finding that provincial schemes for the settlement of debt that include an element of compulsion fall within Parliament's jurisdiction, even in the absence of a formal act of bankruptcy. Thus, the federal power over bankruptcy and insolvency can include matters of contract and property which would normally fall within provincial jurisdiction.

## II. FARM DEBT CRISIS

During the Great Depression, Canada experienced severe economic hardship. Canada's economy was especially vulnerable to the fluctuations of the global market due to its dependence on exports.<sup>7</sup> As the prices and demand for staple products collapsed, many

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<sup>1</sup> *Farmers' Creditors Arrangement Act, 1934*, SC 1934, c 53 [FCAA], as amended by SC 1935, c 20, SC 1935, c 61. See also Virginia Torrie, "Federalism and Farm Debt during the Great Depression: Political Impetuses for *The Farmers' Creditors Arrangement Act, 1934*" (2019) 82:2 Sask L Rev 203 at 207 [Torrie, "Federalism and Farm Debt"].

<sup>2</sup> John A Irving, "The Evolution of the Social Credit Movement" (1948) 14:3 Can J Economics & Political Science 321 at 322.

<sup>3</sup> *Ibid* at 332.

<sup>4</sup> *Debt Adjustment Act, 1937*, SA 1937, c 9 [DAA]; *Reference as to the Validity of The Debt Adjustment Act, Alberta*, [1942] SCR 31 [DAA Reference].

<sup>5</sup> *DAA Reference, ibid*.

<sup>6</sup> Thomas GW Telfer & Virginia Torrie, *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law, 1894–1937* (Vancouver: UBC Press, 2021).

<sup>7</sup> *Ibid* at 103.

Canadians were left unemployed and desperate.<sup>8</sup> Unemployment rates in Canada ranged from 2.5 to 4.2 percent in 1929 rising to 19.3 to 27 percent in 1933. By 1934, two million Canadians received some form of public relief.<sup>9</sup> The problem was critical for prairie farmers as crop values continued to decrease throughout the early 1930s. The effect of falling prices was exacerbated as farmers had been able to easily take on additional debt and expand thanks to high prices and yields in the late 1920s. Because of their high debt load, many farmers were unable to make their payments when prices collapsed in the 1930s. In Saskatchewan, for example, the situation was so severe that from 1930 to 1935 two-thirds of the wheat available for sale would have been consumed by interest payments, with most of the remainder being consumed by taxes.<sup>10</sup>

The high population of farmers in Alberta and the prairie provinces caused farm debt to become a significant political issue.<sup>11</sup> As low prices and drought continued with each passing year and farm debt became a more pressing issue, the prairie provinces faced pressure from farmers to provide legislative relief, protecting them from debt enforcement efforts.<sup>12</sup>

### III. *FARMERS' CREDITORS ARRANGEMENT ACT, 1934*

In response to the possibility of Saskatchewan enacting robust debt moratorium legislation that would make it nearly impossible for creditors to pursue debt enforcement proceedings against farmers in that province, Prime Minister Bennett announced that his government would enact federal debt legislation to assist farmers affected by the debt crisis.<sup>13</sup> In 1934, the new *FCAA* came into force, which was intended to be more moderate than Saskatchewan's proposed legislation.<sup>14</sup> The federal bill was announced as one of Bennett's New Deal statutes, which were a series of statutes branded as creating a new economic and social order, but really only provided for modest changes.<sup>15</sup> The *FCAA* created procedures for farmers to make arrangements for the disposal of their debts with their creditors in order to avoid bankruptcy. While other bankruptcy and insolvency legislation did not stay proceedings against secured creditors, an application under the *FCAA* resulted in an automatic 90-day stay of proceedings for both unsecured and secured claims.<sup>16</sup> Under the *FCAA*, a farmer could apply to a local Official Receiver, who would assist the farmer in developing a compromise proposal. With the consent of the farmer's creditors, the proposal would be submitted to the court for approval. If the creditors did not consent, the farmer

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<sup>8</sup> Peter Neary, ed, *Alan Caswell Collier, Relief Stiff: An Artist's Letters from Depression-Era British Columbia* (Vancouver: UBC Press, 2018) at 3.

<sup>9</sup> See e.g. Michiel Horn, *The Great Depression of the 1930s in Canada* (Ottawa: Can Hist Assoc, Booklet No 39, 1984) at 7, 10; Lara Campbell, *Respectable Citizens: Gender, Family, and Unemployment in Ontario's Great Depression* (Toronto: University of Toronto Press, 2009) at 3.

<sup>10</sup> GE Britnell, "Saskatchewan, 1930-1935" (1936) 2:2 Can J Economics & Political Science 143 at 160.

<sup>11</sup> Torrie, "Federalism and Farm Debt," *supra* note 1 at 208–209. See also Donald H Layh, *A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary and Case Law* (Langenburg, SK: Twin Valley Books, 2009) at 2.

<sup>12</sup> Telfer & Torrie, *supra* note 6 at 104.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Winnipeg Free Press* (3 January 1935) at 1, cited in Alvin Finkel, *Business and Social Reform in the Thirties* (Toronto: James Lorimer, 1979) at 36; Larry A Glassford, *Reaction and Reform: The Politics of the Conservative Party under R.B. Bennett, 1927–1938* (Toronto: University of Toronto Press, 1992) at 173; William Christian & Colin Campbell, *Political Parties and Ideologies in Canada: Liberals, Conservatives, Socialists, Nationalists* (Toronto: McGraw-Hill Ryerson, 1974) at 96.

<sup>16</sup> Torrie, "Federalism and Farm Debt," *supra* note 1 at 236.

could apply to the Board of Review, which could impose a compulsory proposal on the debtor and the creditors. Most of these proposals included a reduction of the farmer's debt coupled with an extended repayment period.<sup>17</sup>

From the perspective of the prairie provinces, the *FCAA* was not as effective as they wanted and needed. To give a sense of the scale of the issue, in 1936, total agricultural debt in Saskatchewan amounted to \$450 million, but debt reductions through federal and provincial schemes had only amounted to \$6.2 million.<sup>18</sup>

In 1935, the *FCAA* was amended such that the *Act* did not apply to any debt created after 1 May 1935 without the consent of the creditors.<sup>19</sup> In 1936, William Easterbrook wrote that the net results of the *FCAA* had not been promising, and doubted that the *Act* had altered the situation in the West to any appreciable extent.<sup>20</sup> Easterbrook had recommended broadening the scope of adjustment in order to avoid the need for more drastic action.<sup>21</sup> In 1938, Parliament amended the *FCAA* again to provide that by December 1938, no new proposals could be received in any province other than Alberta and Saskatchewan.<sup>22</sup>

#### IV. DEBT ADJUSTMENT LEGISLATION IN ALBERTA

There had been several iterations of debt adjustment acts in Alberta before the 1941 reference.<sup>23</sup> The first statute of this type was passed in response to the Prairie Dry Belt Disaster when areas of southern Alberta experienced prolonged drought.<sup>24</sup> The discontent among farmers at that time led to the growth of the United Farmers of Alberta (UFA), which was an agrarian movement formed in 1909.<sup>25</sup> In the Alberta election of 1921, the UFA ousted the previous Liberal government and enacted the *Drought Area Relief Act, 1922* to bring about arrangements between debtors and creditors in areas affected by drought.<sup>26</sup> The *Act* created a Commissioner who was tasked with bringing about agreements between debtors and creditors and provided that no proceedings against resident farmers could be taken except by leave of a judge.<sup>27</sup>

Alberta enacted the first version of the *DAA* in 1923.<sup>28</sup> This *Act* established a Director, who could, on application by a debtor or creditor, confer with both to attempt to bring about

<sup>17</sup> Virginia Torrie, "Farm Debt Compromises during the Great Depression: An Empirical Study of Applications made under the *Farmers' Creditors Arrangement Act* in Minden and Brandon, Manitoba" (2018) 41:1 *Man LJ* 377 at 417.

<sup>18</sup> Britnell, *supra* note 10 at 166.

<sup>19</sup> *The Farmers' Creditors Arrangement Act Amendment Act, 1935*, SC 1935, c 20, s 8.

<sup>20</sup> WT Easterbrook, "Agricultural Debt Adjustment" (1936) 2:3 *Can J Economics & Political Science* 390 at 400.

<sup>21</sup> *Ibid* at 401.

<sup>22</sup> *An Act to amend the Farmers' Creditors Arrangement Act, 1934*, SC 1938, c 47, s 9.

<sup>23</sup> *DAA Reference*, *supra* note 4.

<sup>24</sup> David C Jones, "Prairie Dry Belt Disaster" (4 March 2015), online: <[www.thecanadianencyclopedia.ca/en/article/prairie-dry-belt-disaster](http://www.thecanadianencyclopedia.ca/en/article/prairie-dry-belt-disaster)>. Drought on the prairies was a perennial issue for farmers. At this time, another drought exacerbated debt crisis had occurred as recently as 1913. See also Jeremy Adelman, "Prairie Farm Debt and the Financial Crisis of 1914" (1990) 71:4 *Can Historical Rev* 491 at 506.

<sup>25</sup> Bradford James Rennie, *The Rise of Agrarian Democracy: The United Farmers and Farm Women of Alberta, 1909-1921* (Toronto: University of Toronto Press, 2000) at 36.

<sup>26</sup> *The Drought Area Relief Act, SA 1922*, c 43. See also Jones, *supra* note 24.

<sup>27</sup> *The Drought Area Relief Act, ibid*, ss 4, 8.

<sup>28</sup> *The Debt Adjustment Act, SA 1923*, c 43.

payment of the indebtedness without recourse to legal proceedings. Upon application by a resident farmer, the Director could prevent any proceedings for execution, foreclosure, or sale without leave of a judge if the Director was satisfied that it would be in the interests of the farmer and their creditors.<sup>29</sup> The farmer's creditors could apply for leave to a judge on notice to the Director. Like the *Drought Area Relief Act*, the Director's power under the *DAA* to prevent proceedings only applied in certain areas of the province, which could be modified by the Lieutenant Governor in Council.<sup>30</sup> In 1931 and 1933, the UFA passed new versions of the *Act*, which transferred administration of the scheme from the Director to a Debt Adjustment Board and extended the application to the whole province.<sup>31</sup> These *Acts* prohibited actions by creditors for the enforcement of debts against farmers without permission of the Board.<sup>32</sup>

In the early 1930s, the social conditions of Alberta changed to favour a new social and political movement. At that time, farmers had experienced every agricultural ordeal, such as drought, pestilence, and incredibly low crop prices.<sup>33</sup> Being heavily mortgaged, many discouraged farmers focused their resentment on the banks and loan companies.<sup>34</sup> This unrest created the circumstances for a new political force to take power. In Alberta's 1935 general election, the new Social Credit Party (SCP) won a landslide victory where no UFA candidates were elected.<sup>35</sup> Shortly after the election, the SCP government passed the *Debt Adjustment Act, 1936*.<sup>36</sup> The 1936 version of the *Act* allowed the Lieutenant Governor in Council to add any class of legal proceedings to the list of actions that were prohibited without permission from the Board.<sup>37</sup> Under previous versions, the list of prohibited actions was definitively set out within the statute, but now the government could expand the list as needed by order, which granted the executive the power to bring virtually any proceeding within the ambit of the statute. The fact that this provision could have allowed matters of federal jurisdiction to be incorporated into the *Act* was not relevant to the eventual finding that it was ultra vires, likely because the codified prohibitions were sufficient to find that the *Act* exceeded the province's legislative authority. In addition, this iteration of the *DAA* removed the right of appeal previously available from a decision of the Board.<sup>38</sup> The *Act* prohibited the Board from granting permission in proceedings leading to foreclosure if depreciation caused by abnormal economic conditions would lead to a sale for less than the property's ordinary value. This version of the *DAA* also extended protection to non-farmer debtors for the first time, although, unlike farmers, relief was not granted to them automatically. For protection under the *Act*, these non-farming debtors needed to prove to an Official Referee that it would be unjust or unreasonable for creditors to pursue claims before any actions against the debtor could be prohibited.<sup>39</sup> When Alberta passed the *DAA*, the Canadian Bankers' Association (CBA) warned that although it would not take any retaliatory action, this would make it more difficult for people to secure money by way of

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<sup>29</sup> *Ibid*, s 10.

<sup>30</sup> *Ibid*, ss 7–9.

<sup>31</sup> *The Debt Adjustment Act, 1931*, SA 1931, c 57; *The Debt Adjustment Act, 1933*, SA 1933, c 13.

<sup>32</sup> *The Debt Adjustment Act, 1933*, *ibid*, s 6(1).

<sup>33</sup> Irving, *supra* note 2 at 321.

<sup>34</sup> *Ibid* at 321–22.

<sup>35</sup> *Ibid* at 330.

<sup>36</sup> *The Debt Adjustment Act, 1936*, SA 1936, c 3.

<sup>37</sup> *Ibid*, s 8(1).

<sup>38</sup> *Ibid*, s 8(5).

<sup>39</sup> *Ibid*, ss 17–20.

bank loans.<sup>40</sup> Lucien Maynard, the Social Credit minister who sponsored the legislation, addressed concerns regarding the *Act's* constitutionality, stating that there was no doubt that the provinces alone had jurisdiction over debts. With respect to interest, Maynard argued that the province could legislate on the subject as an incidence to another legislative purpose.<sup>41</sup> He was not reported to have made any comment on the issue of trading on the federal subject of bankruptcy and insolvency, in relation to which the *DAA* was later found ultra vires.

The *DAA* was again amended and consolidated into the *Debt Adjustment Act, 1937*.<sup>42</sup> This version still did not contain an option to appeal the Board's decisions, as much of the SCP caucus was opposed to the idea.<sup>43</sup> With respect to the general prohibition against certain actions, this version removed the distinction between a resident farmer and a debtor, instead relating more broadly to resident debtors.<sup>44</sup> Alberta amended the *DAA* in 1937, 1938, 1939, and 1941.<sup>45</sup> Notably, it was the 1941 amendment which finally added an appeal from the Board to a judge sitting with a jury.<sup>46</sup> It was this version of the *DAA* that was the focus of the 1941 reference to the Supreme Court of Canada.

The first SCP term was fraught with attempts at legislative reform that continued to be disallowed by the federal government, but the *DAA* remained nominally valid.<sup>47</sup> The federal Justice Minister, Ernest Lapointe, felt that no useful purpose could come from disallowing the 1937 *DAA*, as that would only revive the 1936 version which was largely the same.<sup>48</sup> Lapointe believed that reasonable objections could be raised against several of the later amendments, but the issue of disallowance could be avoided as some provisions appeared to be clearly ultra vires.<sup>49</sup>

At the time of the *DAA Reference*, the *Debt Adjustment Act, 1937*, as amended, contained the following provisions. The *Act* constituted a Debt Adjustment Board, the members of which were appointed by the Lieutenant Governor in Council.<sup>50</sup> Unless the Board issued written permission, certain enumerated actions could not be commenced or continued against

<sup>40</sup> "Alberta Legislators Hear Views of Big Delegation," *Calgary Daily Herald* (1 September 1936) 1, online: <[www.proquest.com/hnpcalgaryherald/docview/2252918134/E93ADB166D584BA8PQ/1?accountid=14474](http://www.proquest.com/hnpcalgaryherald/docview/2252918134/E93ADB166D584BA8PQ/1?accountid=14474)>. The debt adjustment legislation caused vendors of land to seek the advice of lawyers on how to circumvent the legislation. See also WG Morrow, "An Historical Examination of Alberta's Legal System — The First Seventy-Five Years" (1981) 19:2 *Alta L Rev* 148 at 159.

<sup>41</sup> "Debt Reduction Act," *Calgary Daily Herald* (1 September 1936) 3, online: <[www.proquest.com/hnpcalgaryherald/pagelevelimagepdf/2252918102/pagelevelImagePDF/E93ADB166D584BA8PQ/1?tlb=t&accountid=14474](http://www.proquest.com/hnpcalgaryherald/pagelevelimagepdf/2252918102/pagelevelImagePDF/E93ADB166D584BA8PQ/1?tlb=t&accountid=14474)>.

<sup>42</sup> *DAA Reference*, *supra* note 4.

<sup>43</sup> "Adjustment Act, Now Law Protects All Debtors," *Calgary Daily Herald* (18 June 1937) 1, online: <[www.proquest.com/hnpcalgaryherald/docview/2252822997/C8F2C956781B4C3FPQ/9?accountid=14474](http://www.proquest.com/hnpcalgaryherald/docview/2252822997/C8F2C956781B4C3FPQ/9?accountid=14474)>.

<sup>44</sup> *DAA Reference*, *supra* note 4, s 2(e). Specific provisions remained for "resident farmers" with respect to proposals made under the *FCAA* and chattel mortgages; see *DAA Reference*, *ibid*, ss 17–19.

<sup>45</sup> *The Debt Adjustment Act, 1937, Amendment Act, 1937*, SA 1937 (3rd Sess), c 2; *The Debt Adjustment Act, 1937, Amendment Act, 1938*, SA 1938, c 27; *The Debt Adjustment Act, 1937, Amendment Act, 1938*, SA 1938 (2nd Sess), c 5; *The Debt Adjustment Act, 1937, Amendment Act, 1939*, SA 1939, c 81; *The Debt Adjustment Act, 1937, Amendment Act, 1941*, SA 1941, c 42.

<sup>46</sup> *The Debt Adjustment Act, 1937, Amendment Act, 1941*, *ibid*, s 7.

<sup>47</sup> JR Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1976) at 105–108.

<sup>48</sup> *Ibid* at 109.

<sup>49</sup> *Ibid* at 110.

<sup>50</sup> *DAA Reference*, *supra* note 4, amended by SA 1937(3), c 2; SA 1938, c 27; SA 1938(2), c 5; SA 1939, c 81; SA 1941, c 42; s 3.

a debtor in the province. This was a comprehensive list, and the Lieutenant Governor in Council could add additional classes of actions.<sup>51</sup> The *DAA* prohibited the grant of a permit for actions in relation to mortgages or agreements of sale if those proceedings would result in a foreclosure sale below ordinary value because of abnormal economic conditions.<sup>52</sup> On application by the debtor or creditor, the Board was mandated to attempt to bring about an arrangement for the payment of the indebtedness and was to attempt to reduce the debts in accordance with the debtor's ability to pay.<sup>53</sup> In relation to debtor farmers specifically, a permit was required to sue a farmer who had failed to carry out an agreement made under the *FCAA*.<sup>54</sup> Board approval was also required to sue on a chattel mortgage given by a farmer after 1 May 1934 as security for past indebtedness.<sup>55</sup> The Board could authorize a farmer to sell goods and chattels subject to a chattel mortgage to provide for the necessities of life, livestock feed, or seed grain.<sup>56</sup> Any appeal from the Board would go before a judge with a jury of six people.<sup>57</sup> The *DAA* provided that if Parliament made legislation for the adjustment of debts, the Lieutenant Governor in Council could suspend from operation any part of the *Act* to prevent a conflict.<sup>58</sup> The *Act* also contained a provision stating that it could not be construed as authorizing anything outside of the competence of the legislature.<sup>59</sup> This provision was evidently included in an attempt to insulate the *DAA* from a challenge on the basis that it exceeded the province's jurisdiction. However, Alberta submitted no written arguments to the Supreme Court of Canada with respect to this provision, and only made brief reference to it in its Privy Council factum. As will be seen below, the section was of no assistance to the province to avoid a finding that the *DAA* was ultra vires in whole.

In 1939, the Alberta Supreme Court (Appellate Division) summarized the purpose of the legislation:

These Acts were passed when debtors as a class throughout the country were in financial distress and broadly speaking these Acts gave to the Board power to prevent a creditor from using oppressively the machinery provided by law to enable a creditor to assert his rights against his debtor. The aim of all these Acts is to protect the debtor by curtailing the procedural rights of the creditor.<sup>60</sup>

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<sup>51</sup> *Ibid*, s 8.

<sup>52</sup> *Ibid*, s 9.

<sup>53</sup> *Ibid*, ss 21, 23.

<sup>54</sup> *Ibid*, s 26.

<sup>55</sup> *Ibid*, s 27.

<sup>56</sup> *Ibid*, s 28.

<sup>57</sup> *Ibid*, s 36.

<sup>58</sup> *Ibid*, s 38.

<sup>59</sup> *Ibid*, s 39.

<sup>60</sup> *Mutual Life Assurance Co v Levitt*, [1939] 2 DLR 324 at 329. *Eddy v Stewart*, [1932] 2 WWR 699 (Sask QB) at 703–704 (reversed on appeal, but not specifically on that point). In *Eddy v Stewart*, the Saskatchewan Court of King's Bench noted the reason for the debt adjustment legislation in that province:

That there is throughout this province a general depression is, sad to say, so notorious a fact that I should and do take judicial notice thereof. The effect of this depression is that debtors are too often unable to pay their open accounts; mortgages have fallen into arrears; taxes remain unpaid, and unless the Legislature intervened there was danger that a great many residents of Saskatchewan would lose their lands.

## V. JUDICIAL HISTORY

The 1941 reference to the Supreme Court of Canada was not the first time Alberta's debt adjustment acts had been challenged in court. The previous year, the Supreme Court of Canada had considered section 8 of the *Debt Adjustment Act, 1937*, which provided that "no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforceable by virtue of any rule of law or equity or by virtue of any statute ... shall be taken ... by any person whomsoever against a resident debtor in any case" without permission from the Board.<sup>61</sup> The Supreme Court of Canada was tasked with deciding whether section 8 was applicable in cases of a right of action on a promissory note, which falls under federal jurisdiction by section 91(18) of the *BNA Act*.<sup>62</sup> The Supreme Court of Canada, in its December 1940 decision, found that section 8, insofar as it applied to bills of exchange and promissory notes, was ultra vires the Province of Alberta.<sup>63</sup>

Alberta continued to face judicial challenges to the legislation, which it vigorously defended. Several months later, in March 1941, Justice O'Connor of the Supreme Court of Alberta decided that the *Debt Adjustment Act, 1937* was ultra vires in whole as legislation in relation to bankruptcy and insolvency, another area of federal jurisdiction.<sup>64</sup> In that case, a creditor had brought an action to enforce a debt against the debtor, McLean, whose sole defence was that a permit had not been obtained under section 8 of the *Debt Adjustment Act, 1937*.<sup>65</sup> The creditor argued that the *Act* was ultra vires.<sup>66</sup> On the same day as Justice O'Connor's judgment, Alberta enacted the *Legal Proceedings Suspension Act, 1941*,<sup>67</sup> which stayed all judgments calling into question the validity of the *Debt Adjustment Act, 1937* for 60 days, and if the province referred the question of constitutionality to the Court, then the stay would continue until the final determination of the reference or any appeal therefrom.<sup>68</sup> The next month, Justice O'Connor responded with a judgment that the province could not stay a judgment relating to the validity of its own legislation, as that would destroy the division of powers. He noted that the province could appeal the original judgment if it liked.<sup>69</sup>

In an apparent response to Justice O'Connor's April judgment, Alberta enacted the *Debt Adjustment Act, 1937, Amendment Act, 1941* days later, which purported to remove the offending portions of the *Act*.<sup>70</sup> There is a parallel here with the history of the *FCAA*. Roughly a year after the passage of the *FCAA*, British Columbia mounted a constitutional

<sup>61</sup> *DAA Reference*, supra note 4, s 8.

<sup>62</sup> *Attorney General for Alberta and Winstanley v Atlas Lumber Co Ltd* (1940), [1941] SCR 87 [Winstanley]; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 (UK) (*British North America Act, 1867*) [*BNA Act*].

<sup>63</sup> See *Winstanley*, *ibid* at 94. Under the *BNA Act*, Parliament has jurisdiction over virtually all aspects of negotiable instruments and currency, notably in section 91(14) (currency and coinage), section 91(15) (issue of paper money), section 91(18) (bills of exchange and promissory notes), and section 91(20) (legal tender). In *Winstanley*, the Supreme Court of Canada decided that the *DAA*'s interference with actions for the enforcement of bills of exchange and promissory notes was repugnant to the federal *Bills of Exchange Act*, RSC 1927, c 16.

<sup>64</sup> *The North American Life Assurance Co v McLean*, [1941] 3 DLR 271 (Alta SC) [*McLean*].

<sup>65</sup> *Ibid* at 272.

<sup>66</sup> *Ibid* at 430.

<sup>67</sup> *Legal Proceedings Suspension Act, 1941*, SA 1941, c 3.

<sup>68</sup> *Ibid*, s 2.

<sup>69</sup> *North American Life Assurance Co v McLean (No 2)*, [1941] 1 WWR 588 (Alta SC) at paras 5–9.

<sup>70</sup> *The Debt Adjustment Act, 1937, Amendment Act, 1941*, supra note 45.



challenge against it, arguing that it was invalid insofar as it affected provincial contracts and taxes.<sup>71</sup> Although the Federal Cabinet had been advised that the *FCAA* was constitutional, the government opted not to risk the benefits to other provinces and amended the *FCAA* so that it no longer applied in British Columbia, thus avoiding the province's challenge.<sup>72</sup> While this approach of amending the statute to avoid a constitutional challenge worked for the *FCAA*, the similar approach in the case of the *DAA* was ultimately not successful.

## VI. SUPREME COURT OF CANADA

Roughly one month after Alberta attempted to fix the *Debt Adjustment Act, 1937*, Mackenzie King's government referred the validity of the *Act* to the Supreme Court of Canada in May 1941. The reference contained the following questions:

- (1) Is The Debt Adjustment Act 1937, ... *ultra vires* of the Legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent?
- (2) Is the said Act as amended operative in respect of any action or suit for the recovery of moneys alleged to be owing under or in respect of any bill of exchange or promissory note?
- (3) Is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit for the recovery of moneys owing under or in respect of any bill of exchange or promissory note?
- (4) Is the said Act as amended operative in respect of any action or suit for the recovery of money or interest thereon, or both, not being money or interest alleged to be owing under or in respect of any bill of exchange or promissory note, whether or not such money or interest is secured upon land situated in the said province, in the following cases, namely, where such action or suit is for the recovery of:
  - (a) the principal amount of such money and interest, if any, where the same are payable in the said province;
  - (b) the principal amount of such money and interest, if any, where the same are payable outside the said province;
  - (c) the interest only upon such money.
- (5) If the answer to any of the parts (a), (b) and (c) of question 4 is [answered] in the negative, is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit in respect of which such answer is given?<sup>73</sup>

The key issue before the Supreme Court of Canada was whether the *DAA* was valid provincial law under Alberta's jurisdiction over property and civil rights or whether the *Act* trespassed on federal jurisdiction over bankruptcy and insolvency. Canada argued that the *DAA*

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<sup>71</sup> Telfer & Torrie, *supra* note 6 at 113.

<sup>72</sup> *Ibid* at 114.

<sup>73</sup> *DAA Reference*, *supra* note 4 at 34.

was insolvency legislation because the Debt Adjustment Board's mandate to bring about debtor-creditor compromises coupled with its ability to bar actions from the courts effectively created a system of compulsory arrangements, which had been held as a key characteristic of insolvency legislation in the 1894 decision of the Privy Council in the *Voluntary Assignments Case*.<sup>74</sup> In that decision, which took place during a period when there were no federal bankruptcy or insolvency statutes, the Privy Council held that an Ontario statute which provided for the voluntary assignments of debts was valid provincial law.<sup>75</sup> A vital element of the *Voluntary Assignments Case* was that the provincial statute, by dealing only with voluntary assignments, did not infringe on the federal power.<sup>76</sup> In the present case, Alberta argued that the Board's power not only did not deal with compulsory assignments, but also did not deal with voluntary assignments, which had by then been included in federal bankruptcy legislation. Instead, Alberta suggested that the *DAA* dealt with voluntary settlements, which could occur entirely separate from an act of bankruptcy. As will be seen below, the combination of the Board's powers did result in an element of compulsion such that the *Act* entered the sphere of bankruptcy legislation. Thus, the striking down of the provincial statute affirmed a broad conception of bankruptcy and insolvency, which can include areas normally related to property and civil rights when the hallmarks of bankruptcy are present.

The Supreme Court of Canada began hearing the arguments in June 1941 and its judgment was delivered in December of the same year.

## A. ARGUMENTS

### 1. ALBERTA AND SASKATCHEWAN

At the Supreme Court of Canada, Alberta primarily argued that the *Debt Adjustment Act, 1937* was *intra vires* as legislation in relation to property and civil rights and the administration of justice. The province also submitted that the *Act* was not in relation to any federal heads of power, namely bankruptcy and insolvency, bills of exchange and promissory notes, and interest. If any part of the *DAA* were found *ultra vires*, Alberta submitted that it was severable, and the remaining parts were valid. Saskatchewan's *factum* merely adopted that of Alberta.

First, Alberta attempted to justify the *DAA* under the provincial power over “[p]roperty and civil rights.”<sup>77</sup> It argued that the words “civil rights” included rights arising from contract and that the words were used in their largest sense.<sup>78</sup> The province also argued that the *DAA* did not deal with any civil rights outside the province. It did not prevent actions brought outside the province, and a right of action in a province is a civil right within that province.<sup>79</sup> Section 8 of the *DAA* was only procedural and did not affect any substantive rights between

<sup>74</sup> *Ontario (Attorney General) v Canada (Attorney General)*, [1894] AC 189 (PC) [*Voluntary Assignments Case*].

<sup>75</sup> Telfer & Torrie, *supra* note 6 at 16.

<sup>76</sup> *Voluntary Assignments Case*, *supra* note 74 at 29–30; Telfer & Torrie, *ibid* at 33.

<sup>77</sup> *BNA Act*, *supra* note 62, s 92(13).

<sup>78</sup> *DAA Reference*, *supra* note 4 (Factum of the Attorney General of Alberta at 6 [AB Factum]); *Citizens Insurance Co v Parsons* (1881), 8 CRAC 406 (PC) at 423 [Parsons].

<sup>79</sup> *Allen v Trusts and Guarantee Co*, [1937] 3 DLR 107 (Alta SC (AD)) at 113.

debtors and creditors. Even so, substantive rights outside the province could be affected as long as it was only incidentally.<sup>80</sup>

Second, Alberta situated sections 8 and 26 of the *DAA* within the provincial power over the “administration of justice” in section 92(14) of the *BNA Act*.<sup>81</sup> It suggested that the section conferred on the provinces the right to regulate and provide for the whole machinery connected with the administration of justice in the province. Everything not covered by section 96, 100, and 101 of the *BNA Act* remained to be dealt with by the province.<sup>82</sup> In addition, Alberta argued that the province’s jurisdiction over the administration of justice included the ability to destroy a right of action, take away and grant jurisdiction to the courts, and to place restrictions on bringing actions in provincial courts.<sup>83</sup>

Next, Alberta argued that the *DAA* did not fall under any of the federal heads of power enumerated in section 91 of the *BNA Act*. It argued at the outset that if a statute falls in pith and substance within section 92, it is immaterial that it may affect matters in section 91.<sup>84</sup> It submitted that the pith and substance of the *Act* was the postponement of debt payments in order to prevent undue hardship on debtors.<sup>85</sup>

Of the federal heads of power, Alberta first argued that the *DAA* did not fall within section 91(21), bankruptcy and insolvency. It submitted that the *Act* did not relate to bankrupt or insolvent persons. Many of the provisions that were found in *McLean* to be in relation to insolvency were removed.<sup>86</sup> The *DAA* was intended to be supplemental to the *Bankruptcy Act* and the *FCAA*, but did not invade on the field of bankruptcy and insolvency.<sup>87</sup> Alberta suggested that there were other grounds for the postponement of debt. For example, under section 9 of the *DAA*, if an insolvent debtor was being forced to sell their property in order to pay their debt, the enforcement could be delayed.<sup>88</sup> Section 8 of the *DAA* did not refer to bankruptcy or insolvency, and if a debtor had become subject to the *Bankruptcy Act*, section 8 no longer applied.<sup>89</sup> The second part of the *Act* enabled the Board to attempt to bring about voluntary settlements, which had no condition of bankruptcy or insolvency.<sup>90</sup> The *DAA* did not have to do with voluntary assignments, which were covered under the *Bankruptcy Act*. Instead, the *DAA* dealt with compositions which were only ancillary to bankruptcy legislation if made before an act of bankruptcy.<sup>91</sup> All provinces had statutes relating to the enforcement of judgments, and these had never been found invalid in relation to bankruptcy, even though the justification for such proceedings generally consisted of an act of bankruptcy.<sup>92</sup> In addition, Alberta argued it was established that simply because a debtor who may become

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<sup>80</sup> *Ladore v Bennett*, [1939] 3 DLR 1 (PC) at 7.

<sup>81</sup> See *BNA Act*, *supra* note 62, s 92(14).

<sup>82</sup> *Ibid.*, ss 99 (appointment by the Governor General in Council of judges), 100 (the payment of salaries as judges), 101 (giving power to Parliament to establish a general Court of Appeal and additional courts). See also *DAA Reference*, *supra* note 4 (AB Factum at 7); *R v Bush* (1888), 15 OR 398 (QB).

<sup>83</sup> *DAA Reference*, *ibid* at 8; *Maley v Cadwell*, [1934] 1 WWR 51 (Sask CA) at 56.

<sup>84</sup> *Attorney General of Manitoba v Manitoba License Holders' Association*, [1902] AC 73.

<sup>85</sup> *DAA Reference*, *supra* note 4 (AB Factum at 10).

<sup>86</sup> *McLean*, *supra* note 64.

<sup>87</sup> *Bankruptcy Act*, RSC 1927, c 11; *FCAA*, *supra* note 1.

<sup>88</sup> *DAA Reference*, *supra* note 4 (AB Factum at 11).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid* at 12.

<sup>92</sup> *Ibid.*; see also *Reference re Farmers' Creditors Arrangement Act 1934*, [1937] AC 391 (PC).

insolvent is relieved by legislation does not mean that the legislation was within the legal category of insolvency.<sup>93</sup>

Second, Alberta argued that the *DAA* was not in relation to bills of exchange and promissory notes. The province noted that *Winstanley* must be accepted as definitely deciding that section 8(a) of the *DAA* was found to be ultra vires or superseded by the *Bills of Exchange Act*.<sup>94</sup> Alberta stated that it would not argue the contrary, but then proceeded to submit that the *DAA* was not in conflict with the *Bills of Exchange Act* and that the dissent in *Winstanley* was correct. It further submitted that the *DAA* was not in relation to the federal power over bills of exchange and promissory notes, and that if the *Bills of Exchange Act* was in conflict with the *DAA*, the former would be ultra vires to that extent.<sup>95</sup> Alberta argued that when a holder of a promissory note sues and obtains judgment, their rights have ceased to be those of a holder of a promissory note and become those of a judgment creditor. Therefore, the *DAA* applied to judgments of the provincial courts and not promissory notes qua promissory notes.<sup>96</sup>

Finally, Alberta submitted that if any part of the *DAA* were found ultra vires it would be severable, and the remaining part would be valid. It argued that the purpose of the *Act* was to give relief to debtors and farmers, and the invalidity of one part was not a reason to discard the remainder.<sup>97</sup>

## 2. CANADA

Canada argued that the *DAA* was ultra vires in whole. It first noted that if a provincial statute is not authorized under section 92 of the *BNA Act* it is ultra vires.<sup>98</sup> Canada then argued that the *DAA* was not legislation in relation to property and civil rights. In its view, the *Act* simply provided that nobody had access to the courts to enforce their rights without permission from a creature of the local government. A large portion of the frozen rights were not “Civil Rights in the Province” within the meaning of section 92(13) of the *BNA Act*, as “Civil Rights in the Province” could not include any civil rights that fall within section 91.<sup>99</sup> The *DAA* applied to a wide array of federal civil rights as well, over which the province did not have the jurisdiction to legislate. The province also could not make such rights inoperative by taking away the means by which they can be enforced. The intention of the legislature was to regulate provincial, as well as federal civil rights, which could not be justified under section 92(13). Section 39 of the *DAA*, which said that the *Act* should not be construed to be outside the competence of the province, did not change the true character of the legislation.<sup>100</sup>

<sup>93</sup> *DAA Reference*, supra note 4 (AB Factum at 13); *L’Union St Jacques de Montreal v Belisle* (1874), 6 LRPC 31 (PC).

<sup>94</sup> *Winstanley*, supra note 62; *Bills of Exchange Act*, RSC 1927, c 16.

<sup>95</sup> *DAA Reference*, supra note 4 (AB Factum at 16).

<sup>96</sup> *Ibid*; see also *King v Hoare*, 153 ER 206; *Commercial Life Assurance Company of Canada v Cadenhead*, [1931] 3 WWR 653 (Alta SC).

<sup>97</sup> *DAA Reference*, supra note 4 (AB Factum at 35).

<sup>98</sup> *Parsons*, supra note 78.

<sup>99</sup> *John Deere Plow Co v Wharton* (1914), 18 DLR 353 (PC) at 359 [Wharton].

<sup>100</sup> *DAA Reference*, supra note 4 (Factum of the Attorney General of Canada at 6 [CA Factum]).

Next, Canada argued that the *DAA* was not in relation to the administration of justice in the province. It argued that a statute which denies access to the courts except with the permission of an administration controlled only by its own arbitrary discretion was an effort to establish a new legal order or system in Alberta. Section 92(14) of the *BNA Act* did not grant authority to the province to substitute for its judicial system an alternative system whereby an administrative body was given the power to decide in what cases the judicial system functions.<sup>101</sup> Likely in apprehension of Alberta's argument that the *DAA* dealt only with procedure, Canada argued that the statute was not in relation to procedure as the right to bring an action is a substantive right. The fact that the protection in the *DAA* was limited to residents of the province was discriminatory and showed that the pith and substance was not the administration of justice nor civil procedure. It would be a contradiction to say that a statute which arbitrarily denies access to the courts was in relation to the administration of justice.<sup>102</sup>

Canada then argued that the real focus of the *DAA* was bankruptcy and insolvency. It noted that the Board had full power to allow or to not allow creditors to begin proceedings and permission could be recalled at any time. There were no rules governing the discretion of the Board and the only appeal was to a jury with equally uncontrolled discretion.<sup>103</sup> The Board was given the duty to arrange compromises between debtors and creditors and the power of the Board was obviously dictatorial. The power was very close to what was given to the Boards of Review under the *FCAA*, which was valid as legislation in relation to bankruptcy and insolvency.<sup>104</sup> Under the provincial legislation, the Board could compel a creditor's consent by refusing to let a creditor sue and could compel a debtor's consent by granting permission to the creditor to sue in full.<sup>105</sup>

Finally, Canada submitted that no provision of the *DAA* was severable, so the whole statute should be found ultra vires.<sup>106</sup>

### 3. CANADIAN BANKERS' ASSOCIATION AND MORTGAGE AND LOANS ASSOCIATION OF ALBERTA

The CBA and Mortgage Loans Association of Alberta (MLAA) argued that the provincial legislation was ultra vires. Like Canada, the CBA and the MLAA argued in separate factums that the *DAA* was not legislation in relation to property and civil rights or administration of justice. They argued that instead, the *Act* was in relation to bankruptcy and insolvency. In relation to property and civil rights, the two Associations argued that the aim of the *DAA* was to protect residents from claims over which the province had no authority to legislate by refusing access to the courts and stopping actions already commenced. This would make

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<sup>101</sup> *Ibid* at 7.

<sup>102</sup> *Ibid*.

<sup>103</sup> *Ibid* at 8.

<sup>104</sup> *Reference re Farmers' Creditors Arrangement Act 1934*, [1936] SCR 384.

<sup>105</sup> *DAA Reference*, *supra* note 4 (CA Factum at 8).

<sup>106</sup> *Ibid*.

areas of federal jurisdiction ineffective, which would be a destruction of the scheme of the *BNA Act*.<sup>107</sup>

Likewise, the Associations argued that the *DAA* could not be justified under sections 92(14) and 92(16) of the *BNA Act*, which included the administration of justice and matters of a merely local nature, respectively. They submitted that instead of dealing with the administration of justice, the *Act* prevented access to the court except with permission of a purely administrative body.<sup>108</sup> The MLAA argued that the power to administer justice did not involve the power to deny justice, nor did it include setting up an administrative body to exclude creditors from the courts. The courts must be available to enforce federal civil rights, otherwise such rights would be meaningless.<sup>109</sup>

The CBA was also concerned with the stability of the banking industry. It suggested that because the banking system involves a large amount of lending, if the collection of debts was rendered impossible, the banks themselves may not be able to repay their depositors and meet other obligations. If this situation would continue in all provinces, the banking business as a whole would be frustrated.<sup>110</sup> The MLAA added that the right of a federal corporation to sue could not be taken away by provincial legislation, as it was of vital importance to the existence of all companies engaged in trade.<sup>111</sup>

Next, the Associations argued that the *DAA* trespassed on bankruptcy and insolvency. The purpose of the *Act* was to deprive creditors of rights under the *Bankruptcy Act* unless permission from the Board was obtained. The *Act* had already been held ultra vires as legislation in relation to bankruptcy and insolvency in *McLean*.<sup>112</sup> Following that case Alberta removed certain sections that were addressed in that decision, but it did not remove all of the objectionable provisions, as the power of the Board was not limited and the principles of the *DAA* were not changed.<sup>113</sup> The *Act* invaded the field of bankruptcy and insolvency and was an attempt to deal with matters already addressed by federal legislation.<sup>114</sup> The legislative history of the *Act* demonstrated a continued effort to take away the rights of creditors against individual debtors in the province.<sup>115</sup>

Finally, the CBA noted that after *Winstanley* it was unnecessary to emphasize that the *DAA* was ultra vires in relation to bills of exchange and promissory notes.<sup>116</sup> Parliament intended to give holders of bills of exchange and promissory notes the right not only to

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<sup>107</sup> *DAA Reference*, supra note 4 (Factum of the Canadian Bankers' Association at 4 [CBA Factum]); *DAA Reference*, supra note 4 (Factum of the Mortgage and Loans Association of Alberta at 2–3 [MLAA Factum]); *Attorney General of Alberta v Attorney General of Canada*, [1939] AC 117 [*Bank Taxation Case*].

<sup>108</sup> *DAA Reference*, *ibid* (CBA Factum at 4).

<sup>109</sup> *DAA Reference*, supra note 4 (MLAA Factum at 5–6); *In re Vancini* (1904), 34 SCR 621.

<sup>110</sup> *DAA Reference*, supra note 4 (CBA Factum at 4).

<sup>111</sup> *DAA Reference*, supra note 4 (MLAA Factum at 9); *Attorney General of Manitoba v Attorney General of Canada*, [1929] AC 260 (PC).

<sup>112</sup> *McLean*, supra note 64.

<sup>113</sup> *DAA Reference*, supra note 4 (CBA Factum at 5); *DAA Reference*, supra note 4 (MLAA Factum at 10–11).

<sup>114</sup> *Independent Order of Foresters v Lethbridge Northern Irrigation District*, [1929] AC 260 (PC) [*Lethbridge*].

<sup>115</sup> *DAA Reference*, supra note 4 (CBA Factum at 5).

<sup>116</sup> *Winstanley*, supra note 62.

obtain judgment, but also to enforce judgment. Therefore, the *DAA* impaired that area of federal jurisdiction as well.<sup>117</sup>

## B. SUPREME COURT OF CANADA DECISION

Chief Justice Duff, who had written the decision in the *FCAA Reference* and the other New Deal references, wrote the Supreme Court of Canada's majority decision that the *DAA* was ultra vires as legislation in relation to bankruptcy and insolvency. Chief Justice Duff was joined in his judgment by Justices Rinfret, Davis, Kerwin, Hudson, and Taschereau. Justice Rinfret, who became the Chief Justice shortly after in 1944, was a defender of provincial jurisdiction and had not found justification for any federal law until the *FCAA Reference*.<sup>118</sup> Justices Kerwin and Taschereau would also later become Chief Justices of the Supreme Court of Canada in 1954 and 1963, respectively.<sup>119</sup> Justice Crocket, who had been on the Supreme Court of Canada bench since 1932 and retired shortly after the reference in 1943, wrote the dissent.<sup>120</sup>

### 1. MAJORITY

The majority of the Court found that the *DAA* was ultra vires in whole. Chief Justice Duff wrote that section 8 allowed the Board to postpone the enforcement of debts arising from statutes or legal rules which the Legislature had no power to vary and with reference to creditors whose power and status the Legislature was incompetent to regulate.<sup>121</sup> He characterized the Debt Adjustment Board as wielding arbitrary discretion which could be exercised by a single member. The *Act* provided no principle or rule for the decision-making of the Board, and so it was empowered in each case to make an arbitrary determination. The appeal to a jury was equally arbitrary.<sup>122</sup>

Chief Justice Duff decided that an enactment which takes away the remedy of action is more than an enactment relating to procedure; it strikes at the substance of a creditor's rights. Section 8 was repugnant to federal statutes relating to matters within the exclusive jurisdiction of Parliament. The provision also fundamentally impaired certain undertakings over which Parliament has exclusive control.<sup>123</sup>

Debts falling entirely within the legislative authority of the province could be dealt with by an enactment with the characteristics of section 8, but in this case, it could not be

<sup>117</sup> *DAA Reference*, *supra* note 4 (CBA Factum at 5–7).

<sup>118</sup> John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2002) at 205. Justice Rinfret dissented in *Larue v Royal Bank of Canada*, [1926] SCR 218 and urged a broad reading of Quebec judicial hypothecs. The Privy Council would ultimately reject his views in rendering the decision in *Attorney General of Quebec v Larue*, [1928] AC 187 (PC) [*Larue*] which adopted a broad reading of the federal bankruptcy and insolvency power. See Telfer & Torrie, *supra* note 6 at 63.

<sup>119</sup> “The Right Honourable Thibaudeau Rinfret, P.C.” (4 September 2008), online: *Supreme Court of Canada* <[www.scc-csc.ca/judges-juges/bio-eng.aspx?id=thibaudeau-rinfret](http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=thibaudeau-rinfret)>; “The Right Honourable Robert Taschereau, P.C., C.C.” (14 July 2015), online: *Supreme Court of Canada* <[www.scc-csc.ca/judges-juges/bio-eng.aspx?id=robert-taschereau](http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=robert-taschereau)>.

<sup>120</sup> “The Honourable Oswald Smith Crocket” (4 September 2008), online: *Supreme Court of Canada* <[www.scc-csc.ca/judges-juges/bio-eng.aspx?id=oswald-smith-crocket](http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=oswald-smith-crocket)>.

<sup>121</sup> *DAA Reference*, *supra* note 4 at 35.

<sup>122</sup> *Ibid* at 35–36.

<sup>123</sup> *Ibid* at 36.

construed to be limited to such debts.<sup>124</sup> The Board could refuse to permit the execution of a debt the province had no authority to regulate.<sup>125</sup> The true pith and substance of the legislation was to establish a board empowered to exercise discriminatory power. While the form was in relation to remedy and procedure, it was really designed to regulate the rights themselves.<sup>126</sup>

It was within the exclusive power of Parliament to legislate on companies with objectives other than provincial objects. Provinces could affect these companies by laws of general application, but the authority of the Board to interfere with these companies in section 8 was not a law of general application in this sense.<sup>127</sup>

Section 8 of the *DAA* was also repugnant to section 2 of the *Interest Act*,<sup>128</sup> and section 26, by dealing with arrangements under the *FCAA*, was likewise outside of provincial jurisdiction.<sup>129</sup>

Chief Justice Duff then considered the impact of the *Act* on the field of bankruptcy and insolvency and found that it did indeed invade the field. Section 8 took away a remedy given by law for the enforcement of debts and substituted a remedy dependent on the arbitrary consent of the Board. In addition, the remedy struck at the debt itself, such that for any obligation to which the *Act* applied there could be no “debt owing” within the meaning of the *Bankruptcy Act*, thus preventing any involuntary petitions under that *Act*.<sup>130</sup> The *Act* also contemplated the use of the Board’s power under section 8 to secure compulsory arrangements for composition and settlement. These were powers normally used when a state of insolvency existed. The Board was empowered to impose on an insolvent debtor and their creditors a settlement which the creditors must accept to proceed with any claim.<sup>131</sup>

While Chief Justice Duff agreed that the aims of the legislation were “laudable,” the statute was an attempt to “invade” the Dominion’s field of bankruptcy and insolvency law:

Indeed the whole statute is conceived as a means of protecting embarrassed debtors who are residents of Alberta. Most people would agree that in this point of view the motives prompting the legislation may be laudable ones. But the legislature, in seeking to attain its object, seems to have entered upon a field not open to it. The statute, if valid, enables the Board (invested with exclusive possession of the key to the Courts) to employ its position and powers coercively in compelling the creditors of an insolvent debtor and the debtor himself to consent to a disposition of the resources of the debtor prescribed by the Board. In this way the statute seeks to empower the Board to impose upon the insolvent debtor and his creditors a settlement of his affairs, which the creditors must accept in satisfaction of their claims. I cannot escape the conclusion that the statute contemplates the use of the powers of the Board in this way. I think this is an attempt to invade the field reserved to the Dominion under Bankruptcy and Insolvency.<sup>132</sup>

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<sup>124</sup> *Ibid* at 37.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid* at 38.

<sup>127</sup> *Ibid*.

<sup>128</sup> RSC, 1927, c 102.

<sup>129</sup> *DAA Reference*, *supra* note 4 at 39.

<sup>130</sup> *Bankruptcy Act*, *supra* note 87, s 4.

<sup>131</sup> *DAA Reference*, *supra* note 4 at 39–40.

<sup>132</sup> *Ibid* at 40.



Chief Justice Duff noted that while it may be true that a board might lawfully be constituted as having some of these powers, it was impossible to disentangle what a legislature might validly enact from the rest. There was no probability that the Legislature would have enacted the statute in a truncated form, therefore the statute as a whole was ultra vires.<sup>133</sup>

## 2. DISSENT

Although his finding was qualified, Justice Crocket decided that the *DAA* was valid provincial legislation. He noted that provincial legislation on matters which fall within section 92 of the *BNA Act* cannot be superseded by federal legislation unless the latter is necessarily incidental to a power under section 91.<sup>134</sup> In addition, the words “Property and Civil Rights” in section 92(13) of the *BNA Act* were used in their largest sense.<sup>135</sup> Justice Crocket found that the true purpose of the statute was to regulate the enforcement of contractual obligations for payment of money to safeguard debtors affected by abnormal economic conditions. Its provisions were predominantly in relation to procedure in civil matters, which was within the province’s legislative power. The right to sue in provincial courts was a civil right in the province whether the claim arose in the province or not. None of the provisions were in relation to bankruptcy, banks, or contracts of federally incorporated companies, though they may be incidentally affected.<sup>136</sup>

Justice Crocket argued that whether the power of the Board was arbitrary did not affect the constitutionality of the enactment. Once it was clear that the enactment was within the competency of the legislature, the courts had no concern as to the reasonableness of the enactment. He found that the *DAA* could not be a colourable device to do something beyond the province’s jurisdiction, since section 39 said that the *Act* could not be construed as authorizing anything outside the legislative competence of the province.<sup>137</sup>

Once he had determined that the *DAA* was in pith and substance in relation to property and civil rights, Crocket found that it could not be ultra vires merely because it may have affected subjects under section 91 of the *BNA Act*, such as bankruptcy and insolvency.<sup>138</sup> Therefore, Justice Crocket decided that the *Act* was not ultra vires, except as it may have conflicted with any existing valid federal legislation in relation to section 91 of the *BNA Act*.<sup>139</sup>

## VII. JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Following the Supreme Court of Canada’s decision, the Alberta Legislature enacted the *Legal Proceedings Suspension Act, 1942*.<sup>140</sup> Like the 1941 version,<sup>141</sup> this *Act* attempted to stay all proceedings where the validity of the *DAA* was at issue until the final determination

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<sup>133</sup> *Ibid* at 40–41.

<sup>134</sup> *Re Fisheries Act, 1914*, [1930] 1 DLR 194 (PC) at 197, 200.

<sup>135</sup> *DAA Reference*, *supra* note 4 at 41–42; *Parsons*, *supra* note 78 at 422–23.

<sup>136</sup> *DAA Reference*, *ibid* at 49–50.

<sup>137</sup> *Ibid* at 52.

<sup>138</sup> *Ibid* at 48.

<sup>139</sup> *Ibid* at 52.

<sup>140</sup> SA 1942, c 5 [LPSA].

<sup>141</sup> *The Legal Proceedings Suspension Act, 1941*, *supra* note 67.

on the *DAA* was made by the Privy Council. The province then referred the validity of the *LPSA* to the Alberta Supreme Court, which decided that the *Act* was ultra vires in whole because it disrupted the scheme of the *BNA Act* by allowing the legislature to decide the limits of its own power.<sup>142</sup> Thus, Alberta's only recourse to maintain the *DAA* was a successful appeal to the Judicial Committee of the Privy Council.

The Privy Council granted Alberta leave to appeal the Supreme Court of Canada's decision in May 1942, and the appeal was heard starting in November of that year. Viscount Maugham, a former Lord Chancellor, delivered the judgment of the Privy Council in February 1943. The Privy Council considered the same constitutional questions as had the Supreme Court of Canada when responding to the appeal. The CBA and the MLAA submitted a joint factum. Saskatchewan also submitted a factum with its own argument. This time, the provinces of Manitoba, New Brunswick, and Ontario joined the appeal as intervenors, but none of them submitted their own written arguments. Manitoba and Ontario adopted the factum of Alberta, and New Brunswick adopted the factums of Alberta and Saskatchewan.

## A. ARGUMENTS

### 1. ALBERTA AND SASKATCHEWAN

On appeal, Alberta argued that the Supreme Court of Canada had been incorrect in deciding that the *DAA* was ultra vires.<sup>143</sup> Saskatchewan made similar arguments as Alberta. After giving a summary of the *DAA*, the other parties' submissions, and the Supreme Court decision, both provinces argued that the pith and substance of the *DAA* was in relation to the postponement of payment of certain debts in order to prevent undue hardship from a forced sale at less than fair market value.<sup>144</sup> They submitted that the *Act* came within sections 92(13), (14), and (16) of the *BNA Act*, and was not in relation to any subject enumerated under section 91. If any provisions were ultra vires, they were severable from the remaining parts, and if the *Act* invaded any area under section 91 it only did incidentally.<sup>145</sup>

The provinces argued that the *DAA* was valid regarding all property and civil rights in the province, but if it invaded any field already occupied by Parliament, the operation of the *Act* should be limited to the legislative competence of the province, relying on section 39 of the *DAA*, which provided as such.<sup>146</sup>

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<sup>142</sup> *Reference re Legal Proceedings Suspension Act, 1942 (Alta)*, [1942] 3 DLR 318 (Alta SC (AD)) at 320–32; Wilbur F Bowker, "The Honourable Horace Harvey, Chief Justice of Alberta" (1954) 32:9 Can Bar Rev 933 at 959.

<sup>143</sup> *Reference Re the Debt Adjustment Act, 1937 (Alberta)*, [1943] AC 356 (PC) [*DAA Reference (JCPC)*]; (Factum for the Attorney General of Alberta at 3 [AB Factum]).

<sup>144</sup> AB Factum, *ibid* at 8–9; *DAA Reference (JCPC)*, *ibid* (Factum of the Attorney General of Saskatchewan at 9–10 [SK Factum]).

<sup>145</sup> *DAA Reference (JCPC)*, *ibid* (AB Factum at 9); *DAA Reference (JCPC)*, *ibid* (SK Factum at 10).

<sup>146</sup> *DAA Reference (JCPC)*, *ibid* (AB Factum at 10); *DAA Reference (JCPC)*, *ibid* (SK Factum at 11).

## 2. CANADA

After summarizing the *DAA* and the Supreme Court of Canada decision, Canada outlined several principles that were important to the appeal:

1. If a provincial statute is not in relation to sections 92, 93, or 95 of the *BNA Act* it is ultra vires.<sup>147</sup>
2. If the provincial statute prima facie falls within section 92, it will not be valid if it also falls within section 91, as subjects under section 91 are excluded from section 92.<sup>148</sup>
3. If the provincial statute falls within section 91 it will be ultra vires even if Parliament has not legislated on the subject. The rule that legislation may be enacted by a province in one respect and by Parliament in another aspect is limited to the field in which Parliament may enact ancillary legislation and does not apply to the field of legislation assigned exclusively to Parliament.<sup>149</sup>
4. The legislative heads under section 92 must not be interpreted to include the heads under section 91. Even when legislating under section 92, a province cannot enact legislation that is inconsistent with provisions under the *BNA Act* other than section 91.<sup>150</sup>
5. To apply these principles, one must look to the pith and substance of the legislation. One must consider the effect and the purpose of the legislation and whether there is an attempt by Parliament or the province to carry out a purpose that is beyond its power.<sup>151</sup>

Canada argued that the effect and purpose of the *DAA* could not be justified under section 92 of the *BNA Act*, so it was ultra vires. It could not fall within the scope of section 92(13) because “Civil Rights in the Province” could not be given such an unrestricted meaning. Civil rights that fall within section 91 were necessarily excluded. However, the purpose and effect of the *DAA* was to replace both provincial and federal civil rights with conditional rights. The *Act* empowered the Debt Adjustment Board to use its discretion to regulate rights which the province could not regulate directly. These effects were not incidental. The entire operation of the statute applied to civil rights which the province could not regulate.<sup>152</sup>

Canada also submitted that the *DAA* could not be in relation to section 92(14) because it was not open to one legislative body to completely control a citizen’s right to access the

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<sup>147</sup> *DAA Reference (JCPC)*, *ibid* (Factum of the Attorney General of Canada at 4 [CA Factum]); *Parsons*, *supra* note 78 at 422.

<sup>148</sup> *DAA Reference (JCPC)*, *ibid* (CA Factum at 4); *Attorney General for Ontario v Attorney General for Canada*, [1896] AC 348 (PC).

<sup>149</sup> *DAA Reference (JCPC)*, *ibid* (CA Factum at 5); *In Re Provincial Fisheries* (1895), 26 SCR 444; *Re the Railway Act Amendment, 1904*, [1907] AC 65 (PC).

<sup>150</sup> *DAA Reference (JCPC)*, *ibid* (CA Factum at 5); *Wharton*, *supra* note 99.

<sup>151</sup> *DAA Reference (JCPC)*, *ibid* (CA Factum at 5); *Attorney General of Ontario v Reciprocal Insurers*, [1924] AC 328 (PC); *Bank Taxation Case*, *supra* note 107.

<sup>152</sup> *DAA Reference (JCPC)*, *ibid* (CA Factum at 6).

court in matters within the jurisdiction of the other legislative body. A province's authority of the administration of justice did not grant to the province the power to substitute for the judicial system a system where another body had absolute and arbitrary power to decide in what cases the judicial system could function. The pith and substance of the *DAA* was to create a new system in denial of the system contemplated by the *BNA Act*.<sup>153</sup> In addition, the powers of the Board did not relate to the administration of justice. The Board was guided by no rules or principles and constituted a new method of affecting the rights of citizens. It could regulate rights created by Parliament, and in this way the province was seeking to do indirectly what it could not do directly. The power to legislate in relation to procedure did not include the power to prohibit actions.<sup>154</sup>

Canada argued that even if the *DAA* were to fall *prima facie* under section 92, it would still be *ultra vires* because it constituted an invasion of many legislative fields exclusively given to Parliament. The Board was given the power to prevent the enforcement of federal rights and no principles were given to limit the exercise of this power.<sup>155</sup> The object of the *Act* was to grant relief for debtors who were unable to pay their debts, so it was legislation in relation to bankruptcy and insolvency. The true nature and character of the *DAA* was to create a scheme similar to the *FCAA*, the purpose of which was to adjust debts of persons unable to pay. Canada suggested that the reason there were no rules given to the Board was that the rules would necessarily relate to bankruptcy and insolvency and would make them plainly invalid. Any attempt of a province to legislate in relation to bankruptcy and insolvency is *ultra vires*, even if the field has not been occupied by Parliament. In this case, the field was occupied and the whole scheme of the *DAA* was repugnant to Parliament's legislation.<sup>156</sup>

Finally, Canada argued that if the *DAA* was not *ultra vires* in whole, it was *ultra vires* insofar as it dealt with civil rights excluded from section 92. The *DAA* was *ultra vires* in relation to bills of exchange and promissory notes and interest and could not be operative in respect of those matters.<sup>157</sup>

### 3. CANADIAN BANKERS' ASSOCIATION AND MORTGAGE LOANS ASSOCIATION OF ALBERTA

On appeal to the Privy Council, the CBA and the MLAA submitted a joint factum. The Associations argued that the *Act* made no exception for the chartered banks, governed by Parliament in its jurisdiction over banking granted by section 91(15) of the *BNA Act*. If the collection of debts were made impossible, banks might be unable to meet their own obligations, which would cause chaos throughout Canada.<sup>158</sup>

They submitted that the legislation did not fall under section 92 and instead fell under section 91 of the *BNA Act*. The *DAA* did not deal with property and civil rights in the province, as it attempted to protect residents from claims over which the province had no

<sup>153</sup> *Ibid* at 6–7.

<sup>154</sup> *Ibid* at 7; see also *Toronto v York (Township)*, [1938] AC 415 (PC).

<sup>155</sup> *DAA Reference (JCPC)*, *supra* note 143 (CA Factum at 8).

<sup>156</sup> *Ibid* at 8–9.

<sup>157</sup> *Ibid* at 9.

<sup>158</sup> *DAA Reference (JCPC)*, *supra* note 143 (Factum of the Canadian Bankers' Association and The Mortgage Loans Association of Alberta at 3 [CBA and MLAA Factum]).

legislative authority by refusing access to the courts except with permission of a purely administrative body. The *Act* also did not deal with section 92(14), as preventing access to the courts was far removed from “administration of justice.”<sup>159</sup>

In addition, the *DAA* invaded the field of bankruptcy and insolvency, given exclusively to the federal government. The Debt Adjustment Board would normally be used when a state of insolvency existed and it was empowered to compel creditors and debtors to consent to the disposition prescribed by the Board.<sup>160</sup> The Associations also argued that the *Act* invaded Parliament’s jurisdiction over trade and commerce, currency and coinage, banking and the incorporation of banks, savings banks, weights and measures, bills of exchange and promissory notes, interest, and legal tender.<sup>161</sup>

Finally, the Associations submitted that even if the *DAA* were not ultra vires in whole, it would not be operative in relation to bills of exchange and promissory notes or interest. In addition, if any part of the *Act* was ultra vires, it was not severable.<sup>162</sup> For that argument, the Associations relied on Chief Justice Duff’s decision where he stated, “it is impossible in this legislation to disentangle what a provincial legislature might competently enact.”<sup>163</sup>

## B. PRIVY COUNCIL DECISION

Viscount Maugham delivered the decision of the Privy Council and determined that the *DAA* was ultra vires in whole. He began by noting that the *DAA* was the most recent of a series of legislative attempts to help resident farmers while keeping within the legislative powers of the province. Viscount Maugham acknowledged that the legislation had been passed as a result of “[d]istress of a very serious nature [that] was rife in Alberta and the adjoining Prairie Provinces from at any rate the year 1920.”<sup>164</sup> He stated that he made no comment on the expediency or wisdom of the *Act*, only the validity:

Their Lordships approach the important questions before them on the assumption that there was sufficient and it may be said grave need for legislation for the relief of distress in the Province. They desire, however, to point out that the question before them is not as to the expediency, still less as to the wisdom, of the present Act. The question is simply one as to the power of the Province to pass it.<sup>165</sup>

Some provisions that had been removed were previously found to encroach on bankruptcy and insolvency, but the important provisions of section 8, which is the section that prohibited certain actions without the permission of the Debt Adjustment Board, remained.<sup>166</sup>

Viscount Maugham noted that the principles of construction of the *BNA Act* were well-established. In the case of conflict between sections 91 and 92 of the *BNA Act*, the former prevails. Legislation coming in pith and substance within section 91 cannot be in the

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<sup>159</sup> *Ibid* at 5.

<sup>160</sup> *Ibid* at 5–6.

<sup>161</sup> *Ibid* at 6.

<sup>162</sup> *Ibid* at 7.

<sup>163</sup> *DAA Reference*, *supra* note 4 at 40.

<sup>164</sup> *DAA Reference (JCPC)*, *supra* note 143 at 2.

<sup>165</sup> *Ibid* at 3.

<sup>166</sup> *Ibid*.

legislative competence of the provinces under section 92. In that case, it is immaterial whether or not Parliament has occupied the field. If provincial legislation coming within section 92 also affects section 91 incidentally, the legislation is valid, unless Parliament chooses to occupy the field.<sup>167</sup>

After giving a summary of the history of bankruptcy legislation in Canada, Viscount Maugham decided that in pith and substance the *DAA* was legislation in relation to insolvency, which was in the exclusive jurisdiction of Parliament. He found that the purpose was to relieve persons from an enforceable liability to pay debts and to compel creditors to accept compositions approved by the Debt Adjustment Board. The effect was to preclude anyone from accessing the courts to enforce the rights without permission of the Board, which may never be obtained. This did not wholly destroy the rights of creditors, but deprived them of the remedies by which those rights could be enforced. The main purpose was to relieve debtors when they were unable to pay their debts as they became due.<sup>168</sup> The Board had the duty to bring about arrangements between debtors and creditors, and it was impossible to escape the conclusion that the *DAA* contemplated the use of section 8 to compel the consent of the parties to the proposed arrangement. The *Act* also prevented a creditor from presenting a bankruptcy petition under the *Bankruptcy Act*, as noted by Chief Justice Duff in his decision.<sup>169</sup>

Viscount Maugham found that the *Act* as a whole constituted an invasion on Parliament's powers in relation to bankruptcy and insolvency and interfered with Parliament's legislation on that subject:

On these grounds their Lordships have come to the conclusion, in agreement with the Supreme Court on the one hand, that the Act as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency, and on the other hand that it obstructs and interferes with the actual legislation of that Parliament on those matters.<sup>170</sup>

Even if some parts related to bankruptcy and insolvency only incidentally it would not avail the province, as the provincial Legislature was precluded from entering that federally occupied field.<sup>171</sup>

Having arrived at that conclusion, Maugham found that it was not necessary to address the other matters discussed in the Supreme Court judgment.<sup>172</sup> Therefore, the opinion of the Supreme Court of Canada was affirmed.

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<sup>167</sup> *Ibid* at 8–9; see also *Voluntary Assignments Case*, *supra* note 74.

<sup>168</sup> *DAA Reference (JCPC)*, *supra* note 143 at 12–13.

<sup>169</sup> *Ibid* at 13.

<sup>170</sup> *Ibid* at 14.

<sup>171</sup> *Ibid*. See also *Larue*, *supra* note 118.

<sup>172</sup> In addition, in response to the argument that section 39 could render the *DAA* *intra vires*, Viscount Maugham held that if apart from section 39 the *Act* was *ultra vires*, it must be construed as such notwithstanding that section. See *DAA Reference (JCPC)*, *supra* note 143 at 15.

## VIII. REACTIONS AND IMPACT OF THE CASE

In 1943, a note authored by “B L,” was published in the *University of Toronto Law Journal* which criticized the courts’ approach to the DAA. In particular, the author disparaged the use of the doctrine of colourability in Chief Justice Duff’s decision and in the Alberta Supreme Court decisions on the matter.<sup>173</sup> Generally speaking, this constitutional doctrine applies when a legislature passes a statute that purports to deal with an issue within its jurisdiction, but is really a disguised attempt to address an issue that is outside its jurisdiction. Put another way, the doctrine means that “you cannot do that indirectly which you are prohibited from doing directly.”<sup>174</sup> B L characterized the doctrine as follows:

[The doctrine of colourability] offers a facile method of invalidating legislation while strengthening judicial control over legislative policies.... Any wide use of the principle of colourability must deepen suspicion that constitutional limitations are merely the formal means by which courts pass on the wisdom of legislation.<sup>175</sup>

Peter Hogg, the constitutional scholar, has noted more diplomatically that the doctrine of colourability has been criticized for the very fine line between adjudicating on policy and adjudicating on validity, as the adjective “colourable” connotes judicial disapproval of the policy of the statute, or at least of how the Legislature brought about the policy.<sup>176</sup>

The result of the *DAA Reference* was not entirely favourable to creditors’ interests. One feature of the DAA had been to postpone any effect of the *Limitations of Actions Act* on any claims while the DAA was in effect. Because that provision was contained in the DAA itself, the determination that the Act as a whole was ultra vires meant that many claims would now be permanently time barred.<sup>177</sup> An editorial in *The Calgary Herald* argued that the Legislature could not plead ignorance that the DAA was ultra vires and its persistence could result in great loss to many creditors. The author of the editorial called on the legislature to fix the issue of time barred claims in the next Legislative session.<sup>178</sup> Other than this procedural issue, creditors were greatly satisfied by the decision, as it would finally allow them to pursue claims for the enforcement of debts. Even so, J.M. Macdonnell of the Dominion Mortgage and Investments Association stated that there would be no rush to foreclosure, but it would be expected that some actions would be pursued against borrowers who were able to pay, but had been hiding behind the legislation.<sup>179</sup> Thus, the Privy Council achieved an outcome that served to benefit creditors, just like in the *Voluntary Assignments Case*. In that decision, the Privy Council pragmatically protected commercial certainty by upholding a provincial statute which allowed for the arrangements of debts in a time when there was no federal bankruptcy statute to achieve a similar purpose.<sup>180</sup> In this case, the Privy

<sup>173</sup> See BL, “A Note on Constitutional Interpretation” (1943) 5:1 UTLJ 161.

<sup>174</sup> *Madden v Nelson and Fort Sheppard Railway Co* (1899), 12 CRAC 224 (PC) at 226.

<sup>175</sup> BL, *supra* note 173 at 173–74.

<sup>176</sup> Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) at 15.5(g).

<sup>177</sup> Mallory, *supra* note 47 at 120.

<sup>178</sup> “Debt Adjustment Legislation Thrown Out,” Editorial, *Calgary Herald* (2 February 1943) 4, online: <[www.proquest.com/hnpccalgaryherald/docview/2252920119/E8B491E8E1C54B66PQ/1?accountid=14474](http://www.proquest.com/hnpccalgaryherald/docview/2252920119/E8B491E8E1C54B66PQ/1?accountid=14474)>.

<sup>179</sup> Mallory, *supra* note 47 at 120.

<sup>180</sup> Telfer & Torrie, *supra* note 6 at 37. On the economic impact of the decision see Loren P Beth, “The Judicial Committee as Constitutional Court for the British Empire 1833-1971” (1977) 7 Ga J Intl & Comp L 47 at 53.

Council protected commercial certainty by striking down a provincial statute which prevented the enforcement of debts. The result demonstrated a continued preference in division of powers questions towards jurisdictional exclusivity as opposed to overlap, which created further regulatory unity by reducing provincial variations in the law of debt enforcement. This emphasis on jurisdictional exclusivity in classical federalism has become less common in modern analysis as courts now prefer “co-operative federalism” as well as a context-specific approach to resolve division of powers problems.<sup>181</sup>

The political aftermath of the Privy Council’s decision would likely have been different if the economic condition of agriculture had been as depressed as in the mid-1930s, but by 1943 improving crop yields and favourable prices had started to bring the prairie provinces back to economic parity with the rest of Canada.<sup>182</sup> Therefore, the public pressure on provincial governments to introduce debt adjustment legislation was lessened. It had also become clear that the provinces lacked the jurisdiction to enact the expansive debt adjustment schemes that they desired. Provincial attempts to address over-indebtedness did not end with the *DAA* but changed in character. Saskatchewan, which had a statute very similar to Alberta’s *DAA*, enacted the *The Provincial Mediation Board Act, 1943*<sup>183</sup> shortly after the Privy Council’s 1943 decision, which created a board that could only assist with voluntary settlements.<sup>184</sup> In addition, Saskatchewan enacted *The Farm Security Act, 1944*,<sup>185</sup> part of which, in its creative attempt to assist farmers, was found ultra vires for infringing on the federal power over interest.<sup>186</sup>

## IX. CONCLUSION

After the Privy Council affirmed the Supreme Court of Canada’s decision that the *DAA* was ultra vires, the prairie provinces attempted to secure an agreement with the federal government to enact long-term debt adjustment legislation. That same February, representatives of Alberta, Saskatchewan, and Manitoba, met at the Inter-Provincial Debt Conference and agreed on a draft bill specifically to address farm debt. The proposed Act would have established a system of provincial boards similar in structure to those created by the *FCAA*. On application of a farmer, the board would have the power to formulate settlements for the purpose of ensuring that the farmer would continue to farm the land and be an efficient producer.<sup>187</sup> The board could alter payment terms, reduce the principal or interest, and reduce the rate of interest on any debt without regard to the date the debt was incurred.<sup>188</sup> The provinces presented the bill to the federal cabinet, but instead of enacting new debt legislation, Parliament amended the *FCAA*.<sup>189</sup> The key change was that while the prior *FCAA* had provided that the *Act* would not apply to debts incurred after 1 May 1935,

<sup>181</sup> Wade K Wright, “Canadian Federalism’s Underlying Question: What It Is and Why It Matters” (2020) 53:2 UBC L Rev 531 at 543–44.

<sup>182</sup> Mallory, *supra* note 47 at 121.

<sup>183</sup> SS 1943, c 15.

<sup>184</sup> Virginia Torrie, “Interest, Insolvency and Prairie Farm Debt: An Historical Analysis of *Reference as to the Validity of Section 6 of the Farm Security Act, 1944 (Saskatchewan)*” (2022) 55:2 UBC L Rev [forthcoming] [Torrie, “Interest, Insolvency and Prairie Farm Debt”].

<sup>185</sup> SS 1944 (2nd Sess), c 30.

<sup>186</sup> Torrie, “Interest, Insolvency and Prairie Farm Debt,” *supra* note 184.

<sup>187</sup> *The Farm Debt Settlement Act* (1942), Calgary, Glenbow Library and Archives (M-1749-34), s 6(1).

<sup>188</sup> *Ibid*, s 6(2).

<sup>189</sup> *The Farmers’ Creditors Arrangement Act, 1943*, SC 1943, c 26 [*FCAA, 1943*].



the new amendment provided that debts incurred after 1 May 1935 could be included, as long as two-thirds of the debt had been incurred before that date.<sup>190</sup> The *FCAA* also designated the Official Receiver as the Clerk of the Court and shifted the role of the Board of Review to the courts in the province.<sup>191</sup> Because the new *FCAA* retained a restriction on what debts could be included, it was certainly not as far-reaching as the provinces had hoped from their draft bill.

On its own initiative to address continued over-indebtedness, Alberta passed the *Debtors' Assistance Act* in March 1943, which repealed the *Debt Adjustment Act*.<sup>192</sup> In the formulation of this *Act*, the legislature plainly took note of Chief Justice Duff's comments in the *DAA Reference*: "[i]t may be that by apt legislation strictly limited to enactments relating exclusively to matters within the legislative jurisdiction of a province, a Board might lawfully be constituted having some of the powers which the Debt Adjustment Board receives under this legislation."<sup>193</sup> This was evidently an attempt to reform the Debt Adjustment Board into something which did not overstep provincial jurisdiction. The *Act* established the Debtors' Assistance Board, which was tasked, *inter alia*, with advising debtors in adjusting their debts and in working out arrangements with creditors, assisting debtors in the preparation of a debt plan before any board or court, and generally advising debtors through proceedings in the court or otherwise pressed for payment by creditors.<sup>194</sup> The Debtors' Assistance Board continues to exist to this day with largely the same powers and functions as it did in 1943, although with more detailed procedures and processes.<sup>195</sup> Its function of promoting financial literacy is currently performed by the charity Money Mentors.

While Viscount Maugham had emphasized that he only wished to comment on the constitutionality of the enactment, Chief Justice Duff was clearly interested in the wisdom of the legislation as well. He had stressed that it was most important "not to lose sight of the arbitrary nature of the Board's authority."<sup>196</sup> Chief Justice Duff characterized both the Board and the appeal to a jury as arbitrary exercises of authority, and found that the pith and substance of the *Act* was to create an authority empowered to exercise discriminatory control.<sup>197</sup> Justice Crocket, writing in dissent, found that whether the statute granted unreasonable or arbitrary power could not affect the constitutionality of the enactment. He wrote:

[T]he courts have no concern as to the reasonableness or injustice of those provisions. If an enactment is of such a palpably unfair character as to offend the public conscience, the remedy lies, not with the courts of the country, but with the people to whom the Legislature is responsible, or in the power of disallowance.<sup>198</sup>

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<sup>190</sup> *Ibid*, s 7.

<sup>191</sup> *Ibid*, ss 3, 15.

<sup>192</sup> *The Debtors' Assistance Act*, SA 1943, c 7.

<sup>193</sup> *DAA Reference*, *supra* note 4 at 40.

<sup>194</sup> *The Debtors' Assistance Act*, *supra* note 192, s 5.

<sup>195</sup> *Debtors' Assistance Act*, RSA 2000, c D-6.

<sup>196</sup> *DAA Reference*, *supra* note 4 at 35.

<sup>197</sup> *Ibid* at 36, 38.

<sup>198</sup> *Ibid* at 51.

Between these two justices, there clearly was a difference in the extent to which they thought the wisdom of a statute might affect its constitutionality. Whether or not Chief Justice Duff's criticism of the legislative scheme itself was warranted, Viscount Maugham found that the *Act* was invalid without commenting on the colourability or wisdom of it. He acknowledged that hardship and injustice would follow from the result of the reference, but noted that they could only be avoided by action of the Legislature of Alberta.<sup>199</sup>

The main significance of *DAA Reference* was that it reinforced a broad construction of the federal power over bankruptcy and insolvency and limited the scope of the provincial power over property and civil rights. Chief Justice Duff's decision in this case was the complement of his analysis in the *FCAA Reference*, where he uncharacteristically justified a federal statute on a broad construction of the federal jurisdiction over bankruptcy and insolvency.<sup>200</sup> Here, he found that a provincial statute could not be justified as legislation in regard to property and civil rights, cementing the idea that the broad provincial power cannot be interpreted to include matters, conceivably connected to property and civil rights, that are specifically granted to the federal Parliament. Chief Justice Duff affirmed that the federal power includes compulsory arrangements made to relieve debtors of obligations when they are in a "state of insolvency."<sup>201</sup> The *DAA* largely had the same purposes as the federal *FCAA*: to protect the assets of debtor farmers so that they could continue farming. At the time of the *FCAA Reference*, a policy objective of debtor rehabilitation and affordability was unprecedented in an insolvency statute.<sup>202</sup> Although neither the Supreme Court of Canada nor the Privy Council directly incorporated the *FCAA Reference* into their decisions, the finding that the *FCAA* was *intra vires* undoubtedly contributed to the determination that the *DAA* was *ultra vires*. Thus, the *DAA Reference* formed an important counterpart to the Supreme Court of Canada's decision in the *FCAA Reference*; the latter case established a broad interpretation of the federal bankruptcy and insolvency power, while the former case affirmed a concomitantly narrow interpretation of the provincial property and civil rights power when dealing with the payment of debts in situations of insolvency.

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<sup>199</sup> *DAA Reference (JCPC)*, *supra* note 143 at 14.

<sup>200</sup> Telfer & Torrie, *supra* note 6 at 151.

<sup>201</sup> *DAA Reference*, *supra* note 4 at 40.

<sup>202</sup> Telfer & Torrie, *supra* note 6 at 146.